Supreme Court of the United States.

OCTOBER TERM, 1954.

No. .

ANTHONY PINO,
Petitioner,

v.

HENRY NICOLLS, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

The petitioner, Anthony Pino, by his attorneys, prays that a writ of certiorari issue to review the judgment entered in this case on August 2, 1954, by the United States Court of Appeals for the First Circuit.

Opinions Below.

The decision and order of the Special Inquiry Officer (R.* p. A64) and the decision of the Board of Immigration Appeals (R. p. A75) are unreported. The opinion of the

*R. refers to the Appendix Record in the court below filed with this petition, pursuant to Rule 21 of the Revised Rules of this court.

District Court (R. p. A104) is reported at 119 F. Supp. 122. The opinion of the Court of Appeals (Appendix A, p. 23) has not yet been reported.

Jurisdiction.

The judgment of the Court of Appeals was entered on August 2, 1954. The jurisdiction of this court is invoked under 28 U.S.C. sec. 1254(1).

Questions Presented.

I. Whether an alien was "convicted" within the purview of section 241(a)(4) of the Immigration and Nationality Act, 66 Stat. 204, where he was granted probation and given a year's suspended sentence, after having been found guilty of stealing twelve golf balls by a local Massachusetts court of limited jurisdiction, and where, after a satisfactory probation, the sentence was revoked and the case placed on file, *i.e.*, continued generally.

II. Whether section 241(a)(4) of the Immigration and Nationality Act should be given a retrospective construction, making it applicable where the "conviction" on which deportation is based occurred prior to the effective date of the Act.

III. Whether the theft of a dozen golf balls is a crime "involving moral turpitude" and whether that phrase is a sufficient criterion for deportability.

IV. Whether a deportation order based on proceedings which violated the procedural requirements of the Immigration and Nationality Act and the Regulations issued thereunder, as well as the requirements of procedural due process, should have been upheld by the court below be-

cause the substantive grounds on which the order was challenged raised only questions of law decided by the court below adversely to the petitioner.

Constitutional Provisions, Statutes and Regulations.

1. Section 241(a)(4) of the Immigration and Nationality Act, 66 Stat. 204, provides:

> "(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> . . . . . .
>
> (4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial; . . ."

2. Also involved and set out in Appendix B are the Fifth Amendment to the United States Constitution and a portion of section 242(b) of the Immigration and Nationality Act, 66 Stat. 209, 8 U.S.C. sec. 1252(b); section 405(a) of the Immigration and Nationality Act, 66 Stat. 280; portions of section 242.53(b) and section 242.61 of the Administrative Regulations Implementing the Immigration and Nationality Act, 8 C.F.R. 1952 revision.

3. Appendix B also includes other provisions and rules less directly involved to which reference is made.

Statement of the Case.

In this case the petitioner challenges the validity of an order of deportation. The petitioner was brought to the United States about forty-six years ago when he was about a year old. He has lived here continuously since that time and is married to an American citizen (R. pp. A64, A2).

In 1926, when the petitioner was twenty years old, he was convicted in Massachusetts of violating General Laws (Ter. Ed.) c. 265, sec. 23, prohibiting carnal knowledge of a girl under sixteen years of age. In December, 1948, the petitioner was charged with the theft of a dozen golf balls in the Third District Court of Eastern Middlesex. This is a local Massachusetts court of limited jurisdiction. From this court a defendant has a right of appeal to the Superior Court, where he is given a trial *de novo* before a jury (see Opinion of court below, Appendix A, pp. 27, 28). The petitioner pleaded not guilty, but was found guilty on January 4, 1949. The court subsequently on January 8, 1949, granted him probation, suspending a one year's sentence in the House of Correction to January 30, 1950. On that date it appeared to the court that the probation had been satisfactory and the court therefore revoked the sentence and placed the case on file (R. pp. A58, A102-103; see Opinion of court below, Appendix A, pp. 27, 28), *i.e.*, continued it generally (R. p. A78).

Based on these two charges, both of which occurred more than five years after the petitioner's entry into the United States, a Special Inquiry Officer of the Immigration and Naturalization Service on March 23, 1953, issued the order of deportation under section 241(a)(4) of the Immigration and Nationality Act.

This order was issued after proceedings begun on or about January 5, 1952, when a warrant was issued for the petitioner's arrest. Relevant parts of these proceedings

are more fully described in the argument regarding their validity.

The deportation order of March 23, 1953, was affirmed by the Board of Immigration Appeals on August 11, 1953. The petitioner surrendered on December 18, 1953, pursuant to notification to report for deportation, and on the same day filed a petition for habeas corpus in the United States District Court for the District of Massachusetts, pursuant to 28 U.S.C. sec. 2241(a). The District Court issued the writ, but after a hearing on the merits discharged the writ and dismissed the petition on February 1, 1954. The petitioner appealed to the Court of Appeals for the First Circuit, which on August 2, 1954, affirmed the order of the District Court.

Argument.

I. The holding of the Court of Appeals that the finding of guilt without sentence satisfied the meaning of "convicted" in section 241(a)(4) is inconsistent with the law of Massachusetts and Federal decisions in analogous situations. It is not in harmony with other Congressional enactments and is inconsistent with the intent of Congress, as indicated in the Immigration and Nationality Act itself and its legislative history.

A. *Applicable Law.* The court below refused to follow the law of Massachusetts in assessing the seriousness and effect of the state action in the golf ball case—to what extent it connotes punishment and is the type of state action from which disabilities flow. This is contrary to the holding of the Board of Immigration Appeals (R. p. A77) in this very case and is inconsistent with *United States ex. rel. Freislinger on Behalf of Kappel* v. *Smith*, 41 F. (2d)

707-708 (7th Cir.) and *United States ex rel. Cerami* v. *Uhl*, 78 F. (2d) 698 (2d Cir.), where the court analyzed the New York law in determining that an order of confinement to the New York House of Refuge was not a "sentence" within the Immigration Act of February 5, 1917. Cf. *Perkins* v. *United States ex rel. Malesevic*, 99 F. (2d) 255.

Furthermore, the holding of the court below is not in accord with the principle of *United States* v. *Di Re*, 332 U.S. 581, in which this court held that the state law was the applicable standard to test actions by state officers in making arrests without warrants.

B. *Massachusetts Law.* Had the court below followed Massachusetts law, it would have been constrained to find that the finding without sentence was not a conviction effective to impose collateral disabilities on the defendant or deprive him of rights. *Commonwealth* v. *Kiley*, 150 Mass. 325. *Commonwealth* v. *Hersey*, 324 Mass. 196, at 205. *Attorney General* v. *Pelletier*, 240 Mass. 264, at 310-311. *People* v. *Schaller*, 229 N.Y.S. 492. See also *Renado* v. *Lummus*, 205 Mass. 155. *Mariano* v. *Judge of District Court of Central Berkshire*, 243 Mass. 90, at 92.

The Fifth Report of the Judicial Council of Massachusetts, Public Document No. 144, reprinted in 15 Mass. Law Quarterly (2), December, 1929, p. 29 *et seq.*, contains a detailed discussion of the procedure here involved and concludes that it is not a "final conviction."

Commonwealth v. *Lockwood*, 109 Mass. 323, and *Munkley* v. *Hoyt*, 179 Mass. 108, relied on by the Board of Immigration Appeals and the District Court, are not to the contrary. In neither case was a "conviction" being used to impose disabilities. See *People* v. *Fabian*, 192 N.Y. 443, at 450.

The fact that the petitioner was placed on probation and the probation was satisfactory is itself inconsistent with

the imposition of disabilities. "Probation looks to reformation and not to a final goal of punishment." *Marks* v. *Wentworth,* 199 Mass. 44, at 46, cited in 2 Attorney General's Survey of Release Procedures, p. 1. See also Chute, "The Development of Probation in the United States" (Glueck, "Probation and Criminal Justice," pp. 228-229), *Mariano* v. *Judge of District Court of Central Berkshire, supra,* and Mass. General Laws (Ter. Ed.) c. 276, sec. 87, which permits the Superior Court to place a defendant on probation even before a finding of guilt.

In the Sixth Annual Report of the Massachusetts Commission on Probation, 1914 (p. 17), Public Document No. 85, cited in Grinnell, "Probation as an Orthodox Common Law Practice in Massachusetts Prior to the Statutory System," 2 Mass. Law Quarterly (6), 591, at 594, it is stated:

> "The probation service deals with human material that has not been stamped as criminal. It undertakes to build out of this a respect for law and correct personal conduct before the difficulty of that task has been heightened by penal experience."

In this case we have, therefore, a record indicating that the court has refused to stamp the petitioner as criminal, but rather revoked the sentence on the basis of a satisfactory probation. It is submitted that this is not the type of court action which entails the imposition of so serious a penalty as deportation.

C. *Federal Law.* The court below in fashioning a general meaning for the word "convicted" ignored decisions going back to 1833, holding that, where a greater penalty is provided for a second or subsequent "conviction," the first "conviction" must include a sentence. *United States*

v. *Thompson*, Fed. Cas. No. 16,485, 4 Cranch C.C. 335 (1833). *Schooley* v. *United States*, 4 F. (2d) 767 (8th Cir.). *Singer* v. *United States*, 278 F. 415 (3d Cir.). *United States* v. *Stoddart*, 11 F. (2d) 827 (Dist. Ct. E.D. Pa.). See also Rule 32(b) of the Rules of Criminal Procedure (327 U.S. 854-855).

The meaning of the word "conviction" adopted by the court below is inconsistent with the meaning adopted by *United States ex rel. Cassetta* v. *Commissioner of Immigration*, 56 F. (2d) 826 (2d Cir.), in interpreting the Narcotic Drugs Import and Export Act, May 26, 1922, c. 202, 42 Stat. 596, providing for deportation of an alien "convicted" of certain narcotic violations. The court there held that actual imprisonment was required.

Even in a naturalization proceeding where the issue is merely the petitioner's good moral character, it has been held that, where the Government chooses to rely on a record of conviction to show bad moral character, the record must contain a final judgment. *In re Ringnalda*, 48 F. Supp. 975. Cf. *In the Matter of F.*, 1 I. & N. Dec. 343.

Thus, too, Congress in passing section 20(b)(3), (4) and (5) of the Alien Registration Act of 1940 (incorporated in section 19(b) of the Immigration Act of 1917, 54 Stat. 671-673), making deportable aliens who "shall have been convicted" of various crimes, intended that that phrase should include actual imprisonment since it went on to provide that no alien deportable under those provisions "shall be deported until the termination of his imprisonment or the entry of an order releasing him on probation or parole."*

*The reference to release on probation, as well as parole, is required to cover such states as Ohio, where "probation" may be granted even after sentence has begun (1 Release Procedures, p. 888), and Louisiana, where probation and parole are confused in the statutes (1 Attorney General's Survey of Release Procedures, p. 439).

Historically, moreover, disabilities flowed from the attaint—the final sentence—rather than the verdict, which Blackstone, in describing the various steps in a proceeding, terms the "conviction." 4 Blackstone, 361. But this distinction had apparently been blurred even in Blackstone's time (4 Blackstone, 381), and various statutes imposing disabilities use the word "conviction" alone. The word has therefore been interpreted to include the judgment or sentence from which the disabilities flowed historically. See also the common-law authorities cited in *United States* v. *Thompson*.

The court below attributes to a probation order and a general continuance the serious consequence of a sentence. But neither a general continuance (*Miller* v. *Aderhold*, 288 U.S. 206, 208) nor probation is the final judgment which includes a sentence (*Berman* v. *United States*, 302 U.S. 211). Probation does not connote a sentence and the punishment inherent in a sentence. "Probation is concerned with rehabilitation," *Berman* v. *United States, supra*, *Korematsu* v. *United States*, 319 U.S. 432, at 435, *Roberts* v. *United States*, 320 U.S. 264, 272, and the dissenting opinion which (reaching the constitutional question that the majority did not have to consider) held that the imposition of a sentence after a period of probation had been served did not "offend the safeguard of the Fifth Amendment against double punishment" (p. 276).

It seems inconsistent with the purposes of the Probation Act to make an alien deportable on the basis of proceedings in which a court has decided that he merits the opportunity for rehabilitation and does not require punishment.*

*Probation in Massachusetts as set out above resembles a sentence even less than under Federal law. It requires consent of the defendant (*Mariano* v. *Judge of District Court of Central Berkshire*, 243 Mass. 90) and can be granted by a Superior Court even before a finding of guilt. G.L. (Ter. Ed.) c. 276, sec. 87. Cf.

Nor is *Korematsu* v. *United States* to the contrary. It merely holds that a probation order is a final decision for appeal purposes. Cf. *Stack* v. *Boyle*, concurring opinion, 342 U.S. 1, at 12.

D. *The Immigration and Nationality Act.* The Act itself indicates that a sentence is required for a conviction. The word "convicted" in section 241(a)(4) must be construed in the light of section 241(b) (8 U.S.C. sec. 1251(b)), which provides:

> "The provisions of subsections (a) (4) respecting the deportation of an alien convicted of a crime or crimes shall not apply . . . if the court *sentencing* such alien for such crime shall make, at the time of first *imposing judgment or passing sentence,* or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported . . ." (Emphasis ours.)

It is obviously contemplated that the "alien convicted of a crime" must be sentenced "for such crime." In *United States ex rel. Cassetta* v. *Commissioner of Immigration, supra,* exactly this interpretative technique is used. *Cf.* section 242(h), which seems to contemplate a sentence of imprisonment actually served.

E. *Legislative History.* Prior to this Act, it was accepted that a sentence actually served was required for deportation. A suspended sentence was not sufficient. *Robinson* v. *Day,* 51 F. (2d) 1022 (R. p. A63). Nowhere,

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King v. *Commonwealth,* 246 Mass. 57, at 60, in which the court said: "The time during which the defendant was on probation was in no sense a part of the term of his sentence."

so far as we could find, is there the slightest intimation in the legislative history that the changes made in Section 241(a)(4) were intended for the first time to subject an alien to deportation on the basis of a suspended sentence or a mere finding of guilt with or without probation. Certainly so drastic a change would have been mentioned.

Nor is the phrase "regardless of whether confined therefor" intended to accomplish this result. The most obvious answer is that this phrase was intended to make a sentence carrying a fine a basis for deportation. But the legislative history indicates that the phrase was used to solve an entirely different problem. In Senate Report No. 1515, 81st Congress, 2d Session, at p. 391, it appears that the Committee on the Judiciary was concerned with modifying the former requirement that the alien be "sentenced more than once," which was interpreted in *Fong Haw Tan* v. *Phelan,* 333 U.S. 6, to mean sentences on two different occasions. See 66 Harvard Law Review, 685.

Accordingly, it provided for two convictions "regardless of whether confined therefor"—that is, regardless of whether confined for each offense separately. Thus concurrent sentences or a single sentence on two counts where the two counts do not arise out of a single scheme of criminal misconduct (*cf.* Rule 8(a), Rules of Criminal Procedure) are now sufficient for deportation.

House Report No. 1365, 82d Congress, 2d Session, U.S. Code Congressional and Administrative News, 1952, p. 1653, at 1715, indicates that the phrase "regardless of whether confined therefor," instead of "sentenced more than once," was used to accomplish just this. It lists as deportable:

> "Aliens who, within five years of entry, are convicted of a crime involving moral turpitude and sentenced to confinement for a year or more; or who, at

> any time after entry, are convicted of two such crimes, whether or not confined. *Thus, an alien who at any time after entry is convicted of two crimes involving moral turpitude is deportable, regardless of whether confined therefor, whereas under existing law the alien must have been sentenced more than once to a term of a year or more because of such convictions.*" (Emphasis ours.)

Thus, too, in the first part of section 241(a)(4), where Congress inserted after "sentenced" the words "or confined," Congress did not intend to change the meaning of "sentenced" as there used (*Robinson* v. *Day, supra*). It appears that this insertion was made to make clear that indeterminate sentences were sufficient for deportation. Here too it seems clear that actual confinement is contemplated. Thus Senate Report No. 1515, p. 391, states:

> "deportation should be required in the case of a single conviction only if the conviction occurred within five years after entry and resulted in confinement in a prison or corrective institution for a year or more."

On the basis of this analysis a sentence to confinement is necessary in both parts of section 241(a)(4), and this is asserted by Mr. Walter Besterman, legislative assistant of the House Committee on the Judiciary, in a commentary on the Act printed with Title 8 of the United States Code Annotated (p. 61).

It may also be significant that Senate Report No. 1515, at p. 71, states that the old immigration law imposes deportation for "conviction of a crime." The Judiciary Committee is obviously here using the word "conviction" to include a sentence actually served.

The interpretation by the court below, particularly when coupled with a retrospective interpretation of the section, will, we daresay, resurrect numberless cases long forgotten in which aliens had been granted probation and then probation had been terminated, as in the Federal courts, or in which the proceedings after a satisfactory probation were continued indefinitely, as in our case. No appeals were taken because the stakes were not high, and because in many states an appeal does not lie from a probation order. (Even in the Federal courts there was great doubt on this question before *Korematsu* v. *United States.*) No attempts were made to get recommendations against deportation as provided by section 19(a) of the Act of 1917, predecessor to section 241(d) of this Act, since the proceedings could not be made grounds for deportation.

It is submitted that the opinion of the court below regarding the meaning of "conviction" which the Board of Immigration Appeals has characterized as "not free from difficulty" (R. p. A78) and which is one of first impression so far as section 241(a)(4) of the Immigration and Nationality Act is concerned is inconsistent with the approach of this court in *Barber* v. *Gonzales,* 347 U.S. 637, and *Fong Haw Tan* v. *Phelan,* 333 U.S. 6.

II. The retrospective effect given to subsection 241(a)(4) is inconsistent with the interpretation by this court of similar language and with Congressional intent. *Kessler* v. *Strecker,* 307 U.S. 22. Cf. *Wallace* v. *Cutten,* 298 U.S. 229. *Kessler* v. *Strecker,* moreover, alerted Congress to this specific problem and directly resulted in the amendment of the immigration laws. See *Bridges* v. *Wixon,* 326 U.S. 135.

Eichenlaub v. *Shaughnessy,* 338 U.S. 521, also indicates that a proper method of accomplishing retrospectivity is

to use the words "have been or may hereafter be convicted," and this language is used in subsection 241(a)(17).

It seems difficult to believe that, if Congress had intended a retrospective interpretation, it would not have used the language of subsection 241(a)(6) or 241(a)(7)—"is or at any time after entry has been"—or the language of subsection 241(a)(5) and subsection 241(a)(11)—"has been convicted"—or even subsection 241(a)(14), (15) and (16)—"shall have been convicted"—or the language of subsection 241(a)(17). In those sections the use of the past tense is understandable, since Congress was merely continuing in effect existing law. But in section 241(a)(4) Congress had made some changes—more or less drastic, depending upon whether our interpretation or the court's is accepted. Prospective operation is understandable in this subsection.

The court below points to the omission of the word "hereafter" in subsection 241(a)(4). "Is," however, when used in other subsections alone, without "hereafter," is still prospective. Thus in section 241(a)(11) "is, or hereafter at any time after entry has been, a narcotic drug addict" was, as the respondent conceded in the court below, intended to operate prospectively only. See House Report No. 1365, 82d Congress, 2d Session, U.S. Code Congressional and Administrative News, p. 1716; Senate Report No. 1137, 82d Congress, 2d Session, p. 22. Here, "is" standing alone in the first part of the clause cannot mean "was heretofore."

The court below calls it an unlikely assumption that Congress would make certain future conduct the basis for deportation without making deportable similar conduct in the past. But that is exactly what Congress did in section 241(a)(11). Aliens who after the effective date of the

Act have become drug addicts are deportable, even after they are cured, but aliens who became drug addicts before the effective date of the Act and were cured before that date are not deportable.

Nor is section 241(d) applicable. That section applies "except as otherwise specifically provided"; and Congress here deliberately, after *Kessler* v. *Strecker*, uses the present tense where it could easily have used the past, in a section where there are a multitude of tense distinctions and where "is" standing alone in section 241(a)(11) is used prospectively. If section 241(d) can operate to modify subsection 241(a)(4), it is a virtual invitation for the executive and judiciary to modify the subsections of section 241(a), picking and choosing as to which will operate retrospectively and which prospectively without reference to the language used. This, it is submitted, the Constitution itself forbids. *Wallace* v. *Cutten*, 298 U.S. 229.

Moreover, the primary purpose of section 241(d) seems to be to make sure that the Act covers aliens who entered before its effective date. The first part of section 241(d) was included in section 19(b) of the Immigration Act of 1917. The addition of the second part on which the court below relies is not mentioned anywhere in the legislative history among the changes made. The inference would be that the second part was merely meant to reinforce the first part. Thus in section 241(a)(2), making deportable an alien who had entered the United States without inspection, the second part makes certain that the "without inspection" will not be read prospectively, and thus make the entry read prospectively.

There are also other ambiguities which section 241(d) may have been enacted to cope with. Thus, apart from section 241(d) it is not clear that the past tenses, *e.g.*, section 241(a)(5) "has been convicted," refer to convictions

before the effective date of the Act as well as before the deportation proceedings commenced.

Moreover, the interpretations here suggested harmonize section 241(d) with section 405(a), which provides in substance that, as to all "liabilities" or "acts" or "matters" before the effective date of the Immigration and Nationality Act, the old law shall apply unless "otherwise specifically provided." Thus, if the petitioner in the future is sentenced to more than one year for a single crime involving moral turpitude, he will be deportable under section 19(a) of the Immigration Act of February 5, 1917.

The legislative history also indicates that Congress intended section 241(a)(4) to apply prospectively. It is of some significance that in both the House and the Senate Reports (Senate Report No. 1137, 82d Congress, 2d Session, p. 21, and House Report No. 1365, U.S. Code Congressional and Administrative News, 1952, p. 1715) the discussions of section 241(a)(4) use the present tense, never slipping into the past tense as would have been natural. Moreover, Representative Walter, who presented the bill in the House, indicates that the only new retrospective provision in the bill is section 241(a)(2) and that the other provisions which operate retrospectively were merely continuations of the old law. On the floor of the House (98 Congressional Record, pp. 4301-4302, April 23, 1952, 82d Congress, 2d Session) he read a protest against the bill from the C.I.O. which stated:

> "By abolishing existing statutes of limitation and by creating and making retroactive new grounds for deportation HR 5678 jeopardizes the status of the resident foreign born including immigrants whose admission into the United States under the Displaced Persons Act was authorized by Congress and supported by the C.I.O."

Representative Walter commented as follows:

> "Of course, HR 5678 does not do that. The Internal Security Act does and the Internal Security Act is a part of the law of the land today. It is restated, that is true, in this bill. This is because we are trying to put together for the first time since 1802 all the statutes relating to immigration and naturalization. It does, however, cover the situation where an alien succeeds in hiding in the United States. If that man is successful for five years his status can be adjusted. Your committee felt this was wrong. We felt that there should not be a premium placed on the ability of an alien to conceal himself. Under the provisions of this new bill where such a situation exists that alien is deportable."

III. The court below holds that the theft of a dozen golf balls is a crime involving moral turpitude and adopts as a criterion that the crime "in its general nature is one which in common usage" would be so classified. It does not use the criterion suggested by the Government in *Jordan* v. *De George*, 341 U.S. 223—whether it is "a serious penal offense"—(see dissenting opinion, p. 235)—though that seems no more an objective criterion than the formulation by the court below.

The majority in *Jordan* v. *De George* relies on fraud as the touchstone—"the contaminating component." But even if some such "contaminating component" can be isolated in larceny, the Massachusetts Legislature has cut out of larceny a class of crimes—those involving theft of $100 or less—which it has made a misdemeanor rather than a felony. Obviously it felt that such petty larceny did not carry the degree of moral obliquity or contamination that larceny generally connotes. Judge Anderson in his dis-

senting opinion in *Tillinghast* v. *Edmead*, 31 F. (2d) 81, said that petty larceny is one of those crimes the facts of which require examination before a decision can be made as to whether it involves moral turpitude. This seems more realistic, but it still leaves us without any objective criterion.

This lack of an objective criterion will be much more serious if the view of the court below is adopted that a sentence to imprisonment is no longer required under the Immigration and Nationality Act. Previously, whatever moral turpitude might mean, a crime on which deportation could be based had to be of such a nature as to impel a court actually to impose a sentence of at least one year's imprisonment. *Robinson* v. *Day*, 51 F. (2d) 1022. But on the interpretation of "convicted" by the court below the crimes hereafter coming before the courts for analysis in deportation proceedings will include a host of minor delinquencies which trial courts have not even felt to require punishment.

Moreover, on the view that section 241(a)(4) of the Immigration and Nationality Act operates retrospectively an additional group of "convictions" will be made the basis for deportation. As to these "convictions" the recommendations of the trial court against deportation under section 19(a) of the Act of February 5, 1917, the predecessor to section 241(b) can have no application since these so-called "convictions" were not grounds for deportation at the time they occurred.

IV. Because the court below reached the conclusion that the alien was deportable as a matter of law, it refused to consider that the deportation order is based on proceedings which violated the procedural requirements of the Act and Regulations, as well as the requirements of

procedural due process. But the question before the court was whether the order of deportation was valid, not whether the petitioner was deportable. The petitioner has the right to have that latter question determined by the Special Inquiry Officer (8 C.F.R. sec. 242.61) acting as a judicial, not an investigating officer (sec. 242(b) of the Act).

The Special Inquiry Officer did not, in fact, consider he was acting in a judicial capacity. For example, he asked (R. p. A17) how many times the petitioner had been arrested. On objection by counsel he stated:

> "A deportation hearing has the intent of determining whether or not the respondent is deportable on the charge contained in the warrant of arrest or under any charge contained within the provisions of the Immigration and Nationality Act."

The Special Inquiry Officer placed in the record Federal Bureau of Investigation reports (Exhibits 4 and 4(a), R. pp. A45, A50) containing "investigative leads" (R. p. A25), and overruled objections to these reports (R. pp. A24, A33) on the ground that they were "cumulative evidence" (R. p. A25). He also admitted Exhibit 3, a report of the petitioner's criminal record (R. pp. A26, A43). This the Board of Immigration Appeals felt important enough to append to its decision (R. pp. A77, A93).

The Special Inquiry Officer states (R. p. A70) that he considered in his decision "the transcript of hearings and the exhibits made a part of the record." These exhibits were obviously irrelevant and the grossest hearsay. Apart from the violations of the petitioner's right to a fair hearing under the Fifth Amendment, the admission and consideration of these exhibits violated the Regulations which provide that the Special Inquiry Officer "shall conduct a

fair and impartial hearing" (8 C.F.R. sec. 242.53(b)), and "shall exclude from the record any evidence that is irrelevant, immaterial or unduly repetitious" (sec. 242.53(b)), and section 242(b) of the Act providing that "the alien shall have a reasonable opportunity to examine the evidence against him and to cross-examine witnesses presented by the Government," an injunction against hearsay evidence.

Nor is it an answer to say that the questions involved in this proceeding were primarily questions of law. Such questions also require unbiased consideration. This is recognized by every judge of an appellate court deciding only questions of law who has at one time or another disqualified himself. It is obviously impossible to tell the degree to which the Special Inquiry Officer was influenced in his decision by these exhibits, termed by the District Court (R. p. A113) "of a highly incendiary character."

Nor was the result reached by the court below inevitably the result the Special Inquiry Officer had to reach. Indeed, the Special Inquiry Officer seems to have taken a somewhat different view of the applicable law from that which the court took. He seems to have relied on Massachusetts law (R. p. A67), as did the Board of Immigration Appeal (R. p. A77), rather than on a general Federal law. An unbiased judicial analysis of Massachusetts law, we submit, would have yielded a finding that the petitioner was not deportable.

Apart from the question of procedural due process, the decision of the court below to refrain from inquiring into the procedural basis of the deportation order is inconsistent with the assumption in *Bilokumsky* v. *Tod*, 263 U.S. 149, "that one under investigation with a view to deportation is legally entitled to insist upon the observance of rules promulgated by the Secretary pursuant to law." See also *Bridges* v. *Wixon*, 326 U.S. 135; *United States ex rel.*

Accardi v. *Shaughnessy*, 347 U.S. 260, and *Handlovitz* v. *Adcock*, 80 F. Supp. 425 (D.C. E.D. Mich.).

The Senate Judiciary Committee too has indicated its opinion that the court will participate in the administration of the Immigration and Nationality Act through active enforcement of the Attorney General's regulations. In Senate Report No. 1515, p. 624, it is stated with reference to regulations issued by the Attorney General:

> "These regulations have the force and effect of law and are binding upon the immigration authorities. Their non-observance might invalidate the entire hearing even though no actual prejudice to the alien is shown."

Conclusion.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

Opinion of the Court of Appeals for the First Circuit.

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 4832. ANTHONY PINO,
PETITIONER, APPELLANT,
v.
HENRY NICOLLS, District Director of Immigration and Naturalization,
RESPONDENT, APPELLEE.

No. 4833. SAME *v.* SAME.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

[119 F. Supp. 122]

Before MAGRUDER, *Chief Judge*, and WOODBURY and HARTIGAN, *Circuit Judges*.

Reuben Goodman, with whom *Paul T. Smith* and *Manuel Katz* were on brief, for appellant.

Jerome Medalie, Assistant U. S. Attorney, with whom *Anthony Julian*, United States Attorney, was on brief, for appellee.

OPINION OF THE COURT.

August 2, 1954.

MAGRUDER, *Chief Judge*. Anthony Pino, an alien who has been ordered to be deported pursuant to § 241(a)(4) of the Immigration and Nationality Act (66 Stat. 204), filed in the district court a petition for a writ of habeas corpus. The district court issued the writ, held a hearing thereon, and on February 1, 1954, entered an order discharging the writ

and dismissing the petition, with an accompanying opinion coming to the conclusion, as had the Board of Immigration Appeals, that the warrant of deportation had been lawfully issued by the Special Inquiry Officer. 119 F.Supp. 122. Pino's appeal from this order of the district court is docketed in this court as No. 4832. Also, Pino filed in the district court a motion to be enlarged on bail pending appeal. Upon denial of this motion on February 2, 1954, Pino took an appeal (No. 4833) from the order of denial. On March 11, 1954, this court denied an interlocutory motion by Pino asking us to enlarge him on bail pending appeal. 211 F.2d 393. Subsequently, by administrative action of the Attorney General, Pino was admitted to bail pending these appellate proceedings, with the result that the appeal in No. 4833 has become moot and will be dismissed on that ground. However, we still have before us the main appeal in No. 4832, involving the validity of the warrant of deportation.

Appellant was born in Italy, and was brought to this country in 1908 when he was one year old. He has maintained a residence here since that time, but has not become an American citizen.

It appears from the record that a warrant of arrest was issued against Pino on April 20, 1938, in an earlier attempt to deport him under § 19 of the Immigration Act of 1917 (39 Stat. 889) in that, after passage of that Act, the alien had, as alleged, been sentenced more than once to imprisonment for a term of one year or more "because of conviction in this country of any crime involving moral turpitude, committed at any time after entry". This deportation proceeding was based upon (1) a conviction in Massachusetts by verdict of a petit jury on March 20, 1928, for carnal abuse of a female child, for which offense Pino was sentenced on March 29, 1928, to a term of five years and a day in the Massachusetts Reformatory in Concord, and (2) a

conviction in Massachusetts on January 6, 1938, following a plea of guilty to the offense of breaking and entering a building in the daytime with intent to commit a felony therein, for which offense he was sentenced to a term of from three to four years in the Massachusetts State Prison, and (3) a conviction in Massachusetts on January 6, 1938, following a plea of guilty to the offense of illegal possession of burglary tools, for which offense he was sentenced to a term of from three to four years in Massachusetts State Prison, to be served consecutively after expiration of the sentence for breaking and entering. For some undisclosed reason, the deportation proceeding dragged on, until finally, on September 6, 1949, Pino obtained from the Acting Governor of Massachusetts and Council a full pardon for each of the two offenses listed in (2) and (3) above. Under § 19 of the Immigration Act of 1917, those pardons cut the ground from under the earlier deportation proceeding; and on October 26, 1950, an Assistant Commissioner of the Immigration and Naturalization Service ordered the cancellation of the warrant of arrest dated April 20, 1938.

Subsequently, on June 27, 1952, Congress passed the Immigration and Nationality Act (66 Stat. 163) making important changes in the requirements for deportation of aliens.

The presently pending deportation proceeding was initiated by a warrant of arrest issued January 5, 1953, and served a few days thereafter. Deportation was sought pursuant to the provisions of § 241(a)(4) of the Immigration and Nationality Act, reading as follows (66 Stat. 204):

> "Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who— . . .
>
> (4) is convicted of a crime involving moral turpitude committed within five years after entry and either

> sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial; . . . ."

The proceeding was based upon two distinct convictions for crimes involving moral turpitude, *viz.*, (1) the aforementioned conviction in Massachusetts by verdict of a petit jury on March 20, 1928, for carnal abuse of a female child, for which offense Pino was sentenced on March 29, 1928, to a term of five years and a day in the Massachusetts Reformatory, and (2) a conviction of petty larceny, contrary to Mass. G.L., c. 266, § 30, upon a finding of guilty on January 4, 1949, after trial in the Third District Court of Eastern Middlesex, for which offense the court originally sentenced Pino to a term of one year in the House of Correction. The execution of this sentence was subsequently suspended by the court, and ultimately the sentence was revoked and the case placed on file, without, however, revoking the finding of guilty. Since the sentence of imprisonment was revoked and Pino served no time for this offense, it could not be used as a basis for deportation in the earlier proceeding under the Immigration Act of 1917. See *United States ex rel. Robinson* v. *Day*, 51 F.2d 1022 (C.A. 2d, 1931). But, as above appears, § 241(a)(4) of the 1952 Act provides for the deportation of aliens convicted, after entry, of two crimes involving moral turpitude "regardless of whether confined therefor".

There is no doubt that the requirements of § 241(a)(4) have been satisfied so far as concerns the offense of carnal abuse of a female child. This offense is defined in Mass. G.L., c. 265, § 23, under the caption "Rape of Child." There

was introduced in the present proceeding a certified copy of a record in the Superior Court for Suffolk County, Mass., from which the following appears: On January 9, 1928, the grand jury handed down an indictment charging that Pino on November 17, 1927, made an assault upon a certain female child under the age of sixteen years with the intent unlawfully and carnally to know and abuse her; and did then and there unlawfully and carnally know and abuse her. Pino pleaded not guilty. After trial, a petit jury returned a verdict of guilty on March 20, 1928. On March 29, 1928, the Superior Court imposed upon Pino a sentence of commitment to the Massachusetts Reformatory at Concord for the term of five years and one day. Though appellant makes some half-hearted contention to the contrary, it cannot now be questioned that this offense properly belongs in the category of crimes involving moral turpitude. *Bendel* v. *Nagle*, 17 F.2d 719 (C.A. 9th, 1927); *Ng Sui Wing* v. *United States*, 42 F.2d 755 (C.A. 7th, 1931). See also *Commonwealth* v. *Roosnell*, 143 Mass. 32 (1886); *Commonwealth* v. *Murphy*, 165 Mass. 66 (1895); *Commonwealth* v. *Hackett*, 170 Mass. 194 (1898).

That brings us to one of the more seriously contested points in the case, whether the record in the Third District Court of Eastern Middlesex, duly authenticated by the testimony of the First Assistant Clerk of that court, compels the conclusion, as a matter of law, that within the meaning of § 241(a)(4) of the Immigration and Nationality Act Pino stands "convicted" in that court of a "crime involving moral turpitude". From this record we derive the following: On December 8, 1948, a complaint was filed in the Third District Court of Eastern Middlesex charging that Pino did steal twelve golf balls of value less than one hundred dollars, the property of R. W. Shattuck Co., Inc. Pino pleaded not guilty. On December 23, 1948, the District Court, sitting without a jury of course, found the

defendant guilty and forthwith imposed a sentence of imprisonment for one year in the House of Correction. On December 27, 1948, Pino took an appeal to the Superior Court, which appeal, if it had been persisted in, would have entitled Pino to a trial *de novo* before a jury in the Superior Court. However, on December 28, 1948, this appeal was withdrawn by leave of court. On the same day a motion for a new trial was filed in the District Court and allowed by that court, which thereupon revoked its previous finding of guilty and continued the case for retrial. On January 4, 1949, after a new trial, the District Court again found defendant guilty and again imposed a sentence of one year's imprisonment in the House of Correction. On January 10, 1949, Pino appealed from this second judgment of conviction. But on January 28, 1949, this second appeal was withdrawn by Pino by leave of court and on the same day the District Court either expressly or impliedly reimposed the original sentence of one year's imprisonment in the House of Correction, and suspended the execution of the same to January 30, 1950. Though the formal entries do not so state, we gather from the testimony of the Assistant Clerk that this was automatically equivalent to putting the defendant on probation for one year beginning January 28, 1949. There was a further entry made on that date, "appeal waived". Apparently the probation report after Pino had served out his probationary period was satisfactory to the court, for as of January 30, 1950, appears the entry "Sentence revoked. On file." The Assistant Clerk testified that this was the usual procedure in the court, in that "where a man is given a suspended sentence and put on probation, he serves out his probation and the case is then filed".

Thus it appears that twice, after the District Court found Pino guilty and imposed sentence upon him, Pino had the opportunity to have a trial *de novo* in the Superior Court,

but in each instance he withdrew his appeal by leave of court. If Pino could have appealed again to the Superior Court when the reimposed or reinstated sentence of imprisonment was suspended by the District Court on January 28, 1949, and the defendant put on probation, such appeal seems to have been expressly waived At any rate, Pino's acquiescence in the suspended sentence and acceptance of probation precluded a subsequent appeal. *Mariano* v. *Judge of District Court,* 243 Mass. 90 (1922); *Renado* v. *Lummus,* 205 Mass. 155 (1910). It is clear, also, that at that point Pino stood "convicted" in the District Court under any suggested definition of the word; and under § 241(a)(4) of the Immigration and Nationality Act, it is of no consequence that he was not actually imprisoned for the offense.

But appellant asserts that this record of conviction was in effect obliterated by the entry on January 30, 1950: "Sentence revoked. On file." In *Marks* v. *Wentworth,* 199 Mass. 44, 45 (1908), the Supreme Judicial Court discussed this procedure of placing a case on file:

> "It has long been the practice in this Commonwealth for a court, with the consent of the defendant, after a verdict or plea of guilty in a criminal case, when for good cause it seems best not to impose sentence immediately, to place the case on file. This practice has been recognized by statute and approved by this court. The effect of it is fully stated in *Commonwealth* v. *Dowdican's Bail,* 115 Mass. 133. See also *Commonwealth* v. *Foster,* 122 Mass. 317, 323; *Commonwealth* v. *Maloney,* 145 Mass. 205. The case then stands on the records of the court, and although usually no further proceedings are had in it, it may at any time be called up and sentence may be imposed, or some other final disposition may be made of it. But the case cannot

> properly be placed on file without the consent of the defendant. He has a right to have it finally disposed of, without unreasonable delay, so that he will not be liable for an indefinite period to be brought into the court and subjected to punishment. Although this practice formerly prevailed only in the higher courts, it was extended by statute to the police, district and municipal courts. R.L. c. 160, § 39. St. 1893, c. 396, § 54. But when the statute gave to these courts authority to place complaints on file, it did not authorize such a disposition of a case against the objection of the defendant."

What was the District Court to do on January 30, 1950? The period had expired within which the execution of the sentence of imprisonment was suspended by prior order. Unless something was done about it, the sentence, no longer suspended, was subject to be carried into execution. If at that date the District Court was finally satisfied that the object of the one-year's probation had been accomplished, in such a way as not to require imprisonment of the defendant either for his own reformation or in the interests of the public, the logical thing to have done would have been to revoke the prison sentence and to dismiss the case, which final disposition the District Court had power to make. See *Marks* v. *Wentworth,* supra. But such action would not have been equivalent to wiping out the record of conviction in the District Court. The finding of guilty was unrevoked, and the order of dismissal in the circumstances would have been no more than a judicial determination that the ends of justice had been served by the period of probationary discipline and surveillance—"an authorized mode of mild and ambulatory punishment"—which had been imposed for the offense of which the defendant had been found guilty. See *Korematsu* v. *United States,* 319 U.S. 432, 435 (1943).

But when the District Court on January 30, 1950, revoked the sentence, the court chose to place the case on file instead of finally disposing of it by dismissing it. As indicated in *Marks* v. *Wentworth*, supra, the District Court could properly have put the case on file only with the consent of the defendant. Apparently the defendant acquiesced in this action of the District Court. At least, there is nothing in the record to suggest dissent. After his apparent acquiescence for over four years, we do not believe that Pino could successfully invoke in the Superior Court the extraordinary remedy of a writ of mandamus to compel the District Court to impose sentence or otherwise make a final disposition of the case. Such a remedy was obtained in *Marks* v. *Wentworth*, supra, but by a defendant who had strenuously registered his dissent at the very time the court, after a finding of guilty, placed the case on file.

The case thus being in the on-file status, technically the district court postponed indefinitely a determination whether the ends of justice required the imposition of a prison sentence for the offense of which Pino had been found guilty. Theoretically, the case could later be taken from the files and a prison sentence imposed. In the most unlikely event that this should happen, Pino asserts that he would be entitled to appeal from the sentence so imposed, and thus obtain a trial *de novo* before a jury in the Superior Court, which trial might result in an ultimate acquittal of the offense of petty larceny. Therefore Pino contends that the present posture of the case, in its on-file status, is so lacking in finality that on the record in the District Court it cannot be said that Pino stands "convicted" in the Massachusetts courts of the crime of petty larceny. Whether Pino could appeal from such a sentence newly imposed after the case was taken from the files we do not know for sure. For present purposes, we shall assume that he could, for we think it makes no difference anyway.

In these deportation cases, where a state crime is involved, it is commonly said that the federal courts are governed by the laws of the state in determining whether the alien was "convicted" of such crime. *United States* v. *Smith*, 41 F.2d 707, 708 (C.A. 7th, 1930). In a certain limited sense, this statement is accurate. We have to look to the law and procedure of the state to interpret what happened in the state courts. For instance, if a finding of guilty has been made by a court without a jury, the law of the state determines whether the court is authorized to make such finding of fact. But examination of the Massachusetts decisions on the meaning of the word "convicted" shows that the word may be given a certain meaning in one context, and something quite different in another. Thus in the leading case of *Commonwealth* v. *Lockwood*, 109 Mass. 323 (1872), the governor and council had issued a pardon to a person after he had been found guilty by verdict of the jury and before sentence had been imposed and while exceptions allowed by the trial judge were pending in the Supreme Judicial Court. It was held that the pardon was effective notwithstanding a provision in the constitution of the state that "no charter of pardon, granted by the governor, with advice of the council, *before conviction*, shall avail the party pleading the same". (Italics added.) The court pointed out that the ordinary legal meaning of "conviction" when used to designate a particular stage of a criminal prosecution triable by a jury "is the confession of the accused in open court, or the verdict returned against him by the jury, which ascertains and publishes the fact of his guilt; while 'judgment' or 'sentence' is the appropriate word to denote the action of the court before which the trial is had, declaring the consequences to the convict of the fact thus ascertained." (P. 325) In *Munkley* v. *Hoyt*, 179 Mass. 108 (1901), the court was dealing with a statutory provision authorizing the Board of Registration in Phar-

macy after hearing to suspend or revoke the registration of a registered pharmacist, "but the license or certificate of registration of a registered pharmacist shall not be suspended or revoked for a cause punishable by law until after *conviction* by a court of competent jurisdiction." (Italics added.) In this case a registered pharmacist had pleaded guilty to a complaint in the Superior Court charging him with unlawful sale of intoxicating liquor and thereupon that court had ordered the complaint placed on file. It was held that this was a "conviction" within the meaning of the foregoing statutory provision. On the other hand, in *Commonwealth* v. *Gorham*, 99 Mass. 420 (1868), applying a statute providing that criminal "conviction" of a witness might be shown to affect his credibility, the Supreme Judicial Court held that in this context the legislature meant to require not merely a verdict of guilty but a final judgment of the court determining guilt. See also *Forcier* v. *Hopkins*, 329 Mass. 668 (1953). And in *Commonwealth* v. *Kiley*, 150 Mass. 325 (1889), it was held that a statute providing that "the conviction by a court of competent jurisdiction" of a liquor licensee for violating any of the provisions of the laws relating to intoxicating liquors "shall of itself make the license of said person void", implied a final judgment of the court.

It is obvious that the Massachusetts courts have never been called upon to interpret the meaning of the word "convicted" in the context of a deportation case, where the word is used in an Act of Congress setting forth the requirements for deportability of aliens. In this context, in the interest of a uniform application of the federal statute, the meaning of the word "convicted" is a federal question to be determined upon due consideration of the policy which § 241(a)(4) of the Immigration and Nationality Act was designed to serve.

The object, of course, is to get rid of aliens with socially undesirable criminal traits. Once in a while, an innocent man may be convicted. But Congress did not impose upon the Attorney General the impossible administrative burden of ascertaining *de novo* whether the alien in fact was guilty of the offenses of which he had been legally convicted. If there stand against the alien two or more records of conviction in courts of competent jurisdiction of crimes involving moral turpitude, the assumption of the Act is that the alien was guilty of the offenses in question and that his social undesirability has thus been sufficiently established for purposes of deportation.

But since legal determination of guilt is made the statutory test of deportability, we should seek an interpretation of the word "convicted" in § 241(a)(4) as will ensure that this legal determination has been made with reasonable certainty and finality. Perhaps a formal plea of guilty to a complaint or indictment, accepted by the court, is a conviction in this sense, even before the court takes any action on the matter of sentence. See *Kercheval* v. *United States*, 274 U.S. 220, 223 (1927); *United States* v. *Scarlata*, F.2d (C.A. 3d, July 19, 1954). We do not have that problem here, for Pino pleaded not guilty to the charge of petty larceny. The government contends that upon a plea of not guilty, the statutory requirement of being "convicted" is satisfied, without more, when a verdict of guilty is returned by the jury, or a finding of guilty is made by the court, as the case may be. We are not prepared to assent to this proposition. A verdict or finding of guilty is usually followed by a motion for a new trial which, as we know, and as was so in Pino's petty larceny case, frequently results in the award of a new trial. So, too, appeals from conviction in the trial court often result in the award of a new trial. Judicial action on the motion for a new trial made immediately after verdict or finding of guilt, and judicial action

in the normal routine appellate review provided by law, are part of the ordinary processes of re-examination, the outcome of which perhaps ought to be awaited before it can be said, with sufficient certainty and definiteness, that the state has "convicted" the alien of crime.

However, if the government must stay its action of deportation to await the outcome of these routine processes of judicial re-examination, that does not mean that the government has to wait forever, until every remote possibility of ultimate upset of a conviction has been extinguished. It is a possibility that, long after conviction in the ordinary sense, new evidence may be discovered, and the case reopened on that ground and a new trial granted. In Massachusetts, many years after verdict of guilty, imposition of sentence, and even affirmance on appeal, it may be possible to obtain the setting aside of a conviction on the ground that it was procured in derogation of the accused's fundamental constitutional rights, by the procedure of a writ of error issued out of the Supreme Judicial Court. See *Lindsey* v. *Commonwealth*, Mass. , 116 N.E.2d 691 (1954); *McGarty* v. *Commonwealth*, 326 Mass. 413 (1950); *Allen* v. *Commonwealth*, 324 Mass. 558 (1949). In other states, a long-standing conviction may, in subsequent habeas corpus proceedings, be judicially determined to have been illegal. The mere possibility of such ultimate upsets does not defeat deportation of the convicted alien; though of course if, prior to deportation, he has succeeded in one of these ways in upsetting his conviction, it can no longer serve as a basis for deportation.

With these general considerations in mind, we are satisfied that on the record in the Third Judicial Court of Eastern Middlesex, as above recited, Pino stands "convicted" of the crime of petty larceny within the meaning of § 401(a)(4). Pino was tried, found guilty, and sentenced to imprisonment. Upon a routine motion for a new trial,

the District Court vacated its finding of guilt, tried him a second time, again found him guilty and reimposed the sentence of imprisonment. Twice Pino appealed to the Superior Court, but in each instance he withdrew his appeal and voluntarily relinquished the opportunity to test his innocence in the appellate courts of the Commonwealth. Execution of the sentence was suspended for a year, during which time we gather that Pino was on probation. At the end of the year the sentence was revoked and the case placed on file in the District Court. Placing the case on file was not equivalent to a revocation of the judicial determination of Pino's guilt, which for deportation purposes is the principal measure of his lack of social desirability. The action of placing the case on file only meant that for the time being the District Court was satisfied that the interests of justice did not require the imposition of a prison term upon Pino for the offense of which he stood convicted; but, as above pointed out, it is of no consequence under the wording of § 241(a)(4) that Pino did not actually serve time for the offense. Though theoretically it may be possible for the District Court at some time in the future to take the case from the files and make a final disposition of it, if we take account of the ordinary modes of procedure in the local courts it must be concluded that there is every probability that, once a case is placed on file, it will remain in that status undisturbed and probably forgotten. This petty larceny case against Pino has already remained on file four and a half years. Pino cannot as a matter of right have it removed from that on-file status so as to have the outstanding record of conviction obliterated.

In fact, after the present deportation proceeding was commenced, Pino filed in the District Court on February 4, 1953, a motion for a new trial on the ground of newly discovered evidence. This motion was denied by the District Court on December 23, 1953, whether on the merits

or on the ground that the motion was untimely does not appear. Of course, if the District Court, pending the deportation proceedings, had granted this long-delayed motion for a new trial and had vacated the finding of guilt, then the prior conviction of this particular crime could no longer have served as a basis for deportation. And while this motion for a new trial was pending undisposed-of by the District Court, with the possibility that it might eventuate in the ultimate establishment of Pino's innocence, Pino might have applied to the District Director for a stay of deportation to await the outcome, but the granting of such a stay would have been a matter of administrative discretion. See 8 C.F.R. (1952 Rev.) § 243.3(b).

Appellant has made no contention in this court that the crime of larceny is not properly to be classified in the general category of crimes involving moral turpitude. It is well-settled that, in ordinary acceptation, the crime of larceny, whether grand or petty, is a crime involving moral turpitude. *Blumen* v. *Haff*, 78 F.2d 833 (C.A. 9th, 1935); *Tillinghast* v. *Edmead*, 31 F.2d 81 (C.A. 1st, 1929). We shall say a word about that. There is some force in the comment by Judge Anderson, dissenting, in *Tillinghast* v. *Edmead*, supra (at p. 84): "It seems to me monstrous to hold that a mother stealing a bottle of milk for her hungry child, or a foolish college student stealing a sign or a turkey, should be tainted as guilty of a crime of moral turpitude." Indeed, it is possible to conceive of circumstances under which almost any crime might be committed from the purest of motives, motives, however, which the law does not accept as a defense. But here again, with considerations of administrative workability in mind, Congress has painted with a broad brush. If the crime in its general nature is one which in common usage would be classified as a crime involving moral turpitude, neither the administrative officials in a deportation proceeding nor the courts on review

of administrative action are under the oppressive burden of taking and considering evidence of the circumstances of a particular offense so as to determine whether there were extenuating factors which might relieve the offender of the stigma of moral obliquity. See *United States ex rel. Robinson* v. *Day*, 51 F.2d 1022 (C.A.2d, 1931). Congress did not overlook the possibility of extenuating circumstances in the particular case, for it prescribed in § 241(b) of the Immigration and Nationality Act of 1952 that the provisions of § 241(a)(4) respecting the deportation of an alien convicted of a crime or crimes "shall not apply (1) in the case of any alien who has subsequent to such conviction been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States, or (2) if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not to be deported . . . ." (66 Stat. 208) A similar provision was found in § 19 of the Immigration Act of 1917. (39 Stat. 889-90)

While appellant relied primarily upon the argument that, on the record in the Third District Court of Eastern Middlesex, he does not stand "convicted" of the crime of larceny, he also urges that he is not deportable under § 241(a)(4) of the Immigration and Nationality Act because that section should be given a strictly prospective construction rendering it inapplicable to crimes and convictions which occurred prior to the day when the Act took effect in 1952. This contention, as observed in the government's brief, makes the unlikely assumption that Congress intended in 1952 to exempt those aliens from deportation who had already revealed the identical socially undesirable criminal traits which Congress now believes to be a sufficient basis to warrant the withdrawal of the privilege of continued residence

in this country, and that Congress was concerned merely with those aliens who at some time in the future might display those characteristics. It would also follow that if an alien prior to 1952 had been convicted of a most heinous crime of moral turpitude, and after the effective date of the 1952 Act had been convicted of one other crime involving moral turpitude, he could not be deported under § 241(a)(4) because the section requires, under the suggested interpretation, a minimum of two convictions after the effective date of the Act. We think the statutory language clearly negatives this reading. Section 241(a) provides that any alien in the United States shall be deported who "(4) . . . *at any time after entry* is convicted of two crimes involving moral turpitude . . . ." (Italics added.) This is to be contrasted with the language of § 241(a)(3), "hereafter, within five years after entry, . . . " and of § 241(a)(11), " . . . hereafter at any time after entry . . . ." It is also significant that in the comparable provision of the predecessor Act, § 19 of the Act of 1917 (39 Stat. 889), Congress provided for the deportation of ". . . any alien who is *hereafter* sentenced to imprisonment for a term of one year or more . . . or who is *hereafter* sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry" (italics added); but Congress chose to omit the key word "hereafter" in § 241(a)(4) of the 1952 revised statute. Furthermore, § 241(d) lays to rest any possible doubt on the matter. That subsection reads: "Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) *that the facts, by reason of which any such*

alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act." (Italics added.)

Certain additional points of a procedural nature are advanced by appellant. He says he was deprived of procedural due process in that the Special Inquiry Officer introduced in evidence a long police record involving Pino, and also certain FBI reports covering Pino's continuous brushes with the criminal law. Admittedly these were hearsay documents irrelevant to the legal issues involved in the charges on which deportation was sought. Their introduction before a jury trying contested issues of fact would no doubt have been prejudicial, for a reading of the documents tends to leave one with the impression that over the years Pino has shown himself to be a particularly undesirable alien, if ever there was one. But if, as we have held as a matter of law, the authenticated and unchallenged records in the Massachusetts courts reveal that the alien, since his entry into the United States, has been convicted of two crimes involving moral turpitude, how can we conclude that the Special Inquiry Officer was in error in ordering Pino's deportation on the ground that such deportation was required by § 241(a)(4) of the Act? If the case went back for another administrative hearing, the same result would be inevitable. Other alleged procedural errors are strictly in the nature of grasping at straws, and we find no sufficient merit or plausibility in any of them to warrant special discussion.

The order of the District Court is affirmed.

APPENDIX B.

Pertinent Statutes.

UNITED STATES CONSTITUTION, FIFTH AMENDMENT.

". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . ."

Immigration and Nationality Act, Public Law 414, June 27, 1952.

SECTION 241(a), (b) AND (d), 66 STAT. 204-208, 8 U.S.C. SEC. 1251(a), (b) AND (d).

CHAPTER 5—DEPORTATION; ADJUSTMENT OF STATUS

GENERAL CLASSES OF DEPORTABLE ALIENS

SEC. 241 (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

(2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this Act or in violation of any other law of the United States;

(3) hereafter, within five years after entry, becomes institutionalized at public expense because of mental disease, defect, or deficiency, unless the alien can show that

such disease, defect, or deficiency did not exist prior to his admission to the United States.

(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;

(5) has failed to comply with the provisions of section 265 unless he establishes to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful, or has been convicted under section 266 (c) of this title, or under section 36 (c) of the Alien Registration Act, 1940, or has been convicted of violating or conspiracy to violate any provision of the Act entitled "An Act to require the registration of certain persons employed by agencies to disseminate propaganda in the United States, and for other purposes", approved June 8, 1938, as amended, or has been convicted under section 1546 of title 18 of the United States Code;

(6) is or at any time has been, after entry, a member of any of the following classes of aliens:

. . . . . .

(7) is engaged, or at any time after entry has engaged, or at any time after entry has had a purpose to engage, in any of the activities described in paragraph (27) or (29) of section 212 (a), . . .

(8) in the opinion of the Attorney General, has within five years after entry become a public charge from causes not affirmatively shown to have arisen after entry;

(9) was admitted as a nonimmigrant and failed to maintain the nonimmigrant status in which he was ad-

mitted or to which it was changed pursuant to section 248, or to comply with the conditions of any such status;

(10) entered the United States from foreign contiguous territory or adjacent islands, having arrived there . . .

(11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of any law or regulation governing . . .

(12) by reason of any conduct, behavior or activity at any time after entry became a member of any of the classes specified in paragraph (12) of section 212(a); or is or at any time after entry has been the manager, or is or at any time after entry has been connected with the management, of a house of prostitution or any other immoral place;

(13) prior to, or at the time of any entry, or at any time within five years after any entry, shall have, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law;

(14) at any time after entry, shall have been convicted of possessing or carrying in violation of any law any weapon . . .

(15) at any time within five years after entry, shall have been convicted of violating the provisions of title I of the Alien Registration Act, 1940;

(16) at any time after entry, shall have been convicted more than once of violating the provisions of title I of the Alien Registration Act, 1940; or

(17) the Attorney General finds to be an undesirable resident of the United States by reason of any of the following, to wit: has been or may hereafter be convicted

of any violation or conspiracy to violate any of the following Acts or parts of Acts or any amendment thereto, the judgment on such conviction having become final, namely: . . . has been convicted of any offense against section 13 of the Penal Code of the United States committed during the period of August 1, 1914, to April 6, 1917, . . .

(18) has been convicted under section 278 of this Act or under section 4 of the Immigration Act of February 5, 1917.

(b) The provisions of subsection (a) (4) respecting the deportation of an alien convicted of a crime or crimes shall not apply (1) in the case of any alien who has subsequent to such conviction been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States, or (2) if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the Service, and prosecution authorities, who shall be granted an opportunity to make representations in the matter.

. . . . . .

(d) Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act.

SECTION 242(b), 66 STAT. 209, 8 U.S.C. SEC. 1252(b).

(b) A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. . . . No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. Such regulations shall include requirements that—

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

. . . . . .

SECTION 242(h), 66 STAT. 208, 8 U.S.C. SEC. 1252(h).

(h) An alien sentenced to imprisonment shall not be deported until such imprisonment has been terminated by the release of the alien from confinement. Parole, probation, or possibility of rearrest or further confinement in respect of the same offense shall not be a ground for deferral of deportation.

SECTION 405(a), 66 STAT. 280, 8 U.S.C SEC. 1101, NOTE.

SAVINGS CLAUSE

SEC. 405. (a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. . . .

Immigration Act of February 5, 1917.

SECTION 19(a), 39 STAT. 889, AS AMENDED BY 54 STAT. 671.

DEPORTATION OF UNDESIRABLE ALIENS GENERALLY

. . . except as hereinafter provided, any alien who is hereafter sentenced to imprisonment for a term of one

year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry; . . . shall, upon the warrant of the Attorney General, be taken into custody and deported: . . . *Provided further,* That the provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, due notice having first been given to representatives of the State, make a recommendation to the Secretary of Labor that such alien shall not be deported in pursuance of this act; nor shall any alien convicted as aforesaid be deported until after the termination of his imprisonment: Provided further, That the provisions of this section, with the exceptions hereinbefore noted, shall be applicable to the classes of aliens therein mentioned, irrespective of the time of their entry into the United States: . . .

SECTION 19(b), 54 STAT. 671.

(b) Any alien of any of the classes specified in this subsection, in addition to aliens who are deportable under other provisions of law shall, upon warrant of the Attorney General, be taken into custody and deported:

(1) . . .

(2) . . .

(3) Any alien who, at any time after entry, shall have been convicted of possessing or carrying in violation of

any law any weapon which shoots or is designed to shoot automatically or semi-automatically more than one shot without manual reloading, by a single function of the trigger, or a weapon commonly called a sawed-off shotgun.

(4) Any alien who, at any time within five years after entry, shall have been convicted of violating the provisions of title I of the Alien Registration Act, 1940.

(5) Any alien who, at any time after entry, shall have been convicted more than once of violating the provisions of title I of the Alien Registration Act, 1940.

No alien who is deportable under the provisions of paragraph (3), (4), or (5) of this subsection shall be deported until the termination of his imprisonment or the entry of an order releasing him on probation or parole.

[These functions were transferred to the ~~Secretary of Labor~~ Attorney General by Reorganization Plan V, 54 Stat. 1238.]

Act of May 26, 1922.

SECTION 2(e), 42 STAT. 596.

(e) Any alien who at any time after his entry is convicted under subdivision (c) shall, upon the termination of the imprisonment imposed by the court upon such conviction and upon warrant issued by the Secretary of Labor, be taken into custody and deported in accordance with the provisions of sections 19 and 20 of the Act of February 5, 1917, entitled "An Act to regulate the immigration of aliens . . ."

Administrative Regulations Implementing the Immigration and Nationality Act (8 C.F.R.).

Sec. 242.53. . . .

. . . . . .

(b) *Special inquiry officers; general duties.* The special inquiry officer shall conduct a fair and impartial hearing. No decision of deportability shall be valid unless based upon reasonable, substantial and probative evidence. He shall exclude from the record any evidence that is irrelevant, immaterial, or unduly repetitious. In his discretion, he may exclude from the record any argument in support of objections, but in such event, the respondent may submit a brief in support of objections. . . .

(c) *Special inquiry officers; specific duties.* At the commencement of the hearing under this part, the special inquiry officer shall . . . (4) advise the respondent that he will have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government, . . .

Sec. 242.61. *Decision of special inquiry officer*—(a) *Preparation of written decisions.* . . . the special inquiry officer shall, as soon as practicable after the conclusion of the hearing, prepare a written decision signed by him which shall set forth a summary of the evidence adduced and his findings of fact and conclusions of law as to deportability, ... The decision shall be concluded with the order of the special inquiry officer as provided in paragraph (c) of this section.

(b) . . .

(c) *Order of special inquiry officer.* The order of the special inquiry officer shall be (1) that the alien be de-

ported, or (2) that the proceedings be terminated, or (3) that the alien's deportation be suspended, or . . .

(d) . . .

(e) *Finality of order.* The order of the special inquiry officer shall be final except when:

(1) . . .

(2) An appeal is taken to the Board of Immigration Appeals.

United States Code, Title 18, Crimes and Criminal Procedure.

§ 3651. SUSPENSION OF SENTENCE AND PROBATION.

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States, except in the District of Columbia, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

. . . . . .

The court may revoke or modify any condition of probation, or may change the period of probation.

The period of probation, together with any extension thereof, shall not exceed five years.

While on probation and among the conditions thereof, the defendant—

May be required to pay a fine in one or several sums; and

May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had; and

May be required to provide for the support of any persons, for whose support he is legally responsible.

The defendant's liability for any fine or other punishment imposed as to which probation is granted, shall be fully discharged by the fulfillment of the terms and conditions of probation.

. . . . . .

§ 3653. REPORT OF PROBATION OFFICER AND ARREST OF PROBATIONER.

When directed by the court, the probation officer shall report to the court, with a statement of the conduct of the probationer while on probation. The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation, as shall seem advisable.

. . . . . .

§ 3655. DUTIES OF PROBATION OFFICERS.

The probation officer shall furnish to each probationer under his supervision a written statement of the conditions of probation and shall instruct him regarding the same.

He shall keep informed concerning the conduct and condition of each probationer under his supervision and shall report thereon to the court placing such person on probation.

He shall use all suitable methods, not inconsistent with the conditions imposed by the court, to aid probationers and to bring about improvements in their conduct and condition.

. . . . . .

Rules of Criminal Procedure.

RULE 8. JOINDER OF OFFENSES AND OF DEFENDANTS.

(a) JOINDER OF OFFENSES. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

. . . . . .

RULE 32. SENTENCE AND JUDGMENT.

. . . . . .

(b) JUDGMENT. A judgment or conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. . . .

Massachusetts General Laws (Tercentenary Edition).

CHAPTER 218.

SECTION 38. . . . Subject to any other provisions of law relative to the filing of complaints for particular crimes, district courts may place on file any complaint in a criminal case other than . . .

CHAPTER 265.

SECTION 23. Whoever unlawfully and carnally knows and abuses a female child under sixteen shall be punished by imprisonment in the state prison for life or for any term of years, or, except as otherwise provided, for any term in any other penal institution in the commonwealth.

CHAPTER 266.

SECTION 30. (1) Whoever steals . . . the property of another . . . shall be guilty of larceny, and shall, if the value of the property stolen exceeds one hundred dollars be punished by imprisonment in the state prison for not more than five years or by a fine of not more than six hundred dollars and imprisonment in jail for not more than two years; or, if the value of the property stolen does not exceed one hundred dollars, shall be punished by imprisonment in jail for not more than one year or by a fine of not more than three hundred dollars; . . . [As amended by St. 1945, c. 282, sec. 2.]

CHAPTER 276.

SECTION 87. The superior court may place upon probation under any of its probation officers any person before it charged with crime and any court may place any person convicted before it in the care of its probation officer for such time and upon such conditions as it deems proper; provided, that no person convicted of a felony by a district court shall be placed on probation by said court in such case if it shall appear that he has been previously convicted of any felony; . . .

CHAPTER 279.

SECTION 1. When a person convicted before a court is sentenced to imprisonment, the court may direct that the execution of the sentence be suspended, and that he be placed on probation for such time and on such terms and conditions as it shall fix. . . . [As amended by St. 1934, c. 205, sec. 1.]